SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 997

ASSOCIATED TRUCK LINES, INC., ET AL.,
Appellants,

—v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

CONRAD A. BRADSHAW
1 Vandenberg Center
Grand Rapids, Michigan 49502

PETER T. BEARDSLEY
R. EDWIN BRADY
ALBERT B. ROSENBAUM
1616 P Street, N.W.
Washington, D.C. 20036

ROLAND RICE
J. ELLIOTT BUNCE
RICHARD B. SIGMON
618 Perpetual Building
Washington, D.C. 20004

Attorneys for Appellants

Of Counsel:

WARNER, NORCROSS & JUDD
1 Vandenberg Center
Grand Rapids, Michigan 49502

RICE, CARPENTER AND CARRAWAY
618 Perpetual Building
Washington, D.C. 20004

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Appellants are aware that the Court does not encourage briefs in reply to motions to affirm. (Rule 16(4).) However, they believe that two matters in the Government motion to affirm herein require clarification for a proper consideration of the issues involved and submit this brief for that purpose.

First, the Government states at page 4 of its motion that the question presented by this appeal "is similar to that" in *Greyhound Lines* v. *United States*, 268 F. Supp. 746 (N.D. Ill. 1967), affirmed *per curiam*, 389 U.S. 216. However, the Court in the *Greyhound* case, at 268 F. Supp. 748, noted the significant difference in the Com-

mission's statutory power with respect to through routes between motor carriers of property such as is involved here and its power over through routes of a motor carrier of passengers as was there involved.

> "Other cases cited by Greyhound involve the establishment of through routes between motor carriers of property or a motor carrier of property and a water carrier. The Commission's authority with respect to such carriers arises under Section 216(c), 49 U.S.C. 316(c), which is permissive and provides 'Common carriers of property by motor vehicle *may* establish * * *.' (Italics supplied.) Section 216(a), with respect to passenger carriers, is mandatory and reads, 'It shall be the duty of every common carrier of passengers by motor vehicle to establish * * *.' No case involving a passenger carrier has been cited by Greyhound."

The permissive nature of Section 216(c) in contrast to the mandatory requirements of Section 216(a) results in a fundamental dissimilarity of the issues in the *Greyhound* case and in this appeal, contrary to the Government's statement.

Secondly, in setting out the issues on this appeal, the Government has failed to make the necessary distinction between the Commission's action in requiring appellant Associated Truck Lines, Inc., to establish through-route, joint-rate, and interchange arrangements on furniture, and its action directing the summary suspension of future tariffs seeking to cancel such arrangements on some

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The Court stated in the *Greyhound* decision that "even in cases involving motor carriers of property, the Commission has, where appropriate, refused to permit withdrawal of a voluntarily established service. But the only authority cited was *Washington, D. C., Store-Door Delivery*, 27 I.C.C. 347, which involved the withdrawal of a delivery service by railroad carriers and which was decided in 1913, rather than 1939 as shown in the *Greyhound* report), more than twenty years before passage of the Motor Carrier Act.

commodities but not on others. At page 5, the Government states:

> "The appellant [*sic*] erroneously attributes to the Commission the position that a motor common carrier of general commodities who has undertaken to participate in through-route, joint-rate arrangements with connecting carriers is unable to withdraw therefrom (J.S. 6)."

The tariff provision of Associated Trunk Lines, Inc., cancelling its through-route, joint-rate arrangements on furniture, which the Commission found unlawful, became effective July 2, 1966, and was a reissue of a provision originally effective May 1, 1966, whereas the complaint which formed the basis of the Commission's action was filed February 5, 1967, more than nine months after the initial effective date of the cancellation. (J.S. 7a) Thus the issue with respect to the Commission's order that Associated cancel the tariff provision in question (J.S. 26a), is not whether the Commission can prevent a property motor carrier's withdrawal of a through-route arrangement, *but whether it may compel such a carrier to establish a through-route arrangement.* This distinction was made clear in appellants' statement of the questions and in the body of the jurisdictional statement. (J.S. 3, 10-11) The assailed order compelling Associated to establish through routes on furniture is in direct conflict with the express terms of Section 216(c) providing that, "Common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates. . . ." (Emphasis added)

This appeal raises for the first time the question of the Commission's power under the permissive provisions of Section 216(c) to compel a property motor carrier to establish through routes on one commodity if it maintains through routes on other commodities. It also raises the question of the Commission's power under that statutory section to declare such an all-or-none policy as a

standard for future tariff publication by motor property carriers. Appellants urge the Court to find that the questions are substantial and require that probable jurisdiction be noted herein.

Respectfully submitted,

CONRAD A. BRADSHAW
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Grand Rapids, Michigan 49502

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ALBERT B. ROSENBAUM
1616 P Street, N.W.
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